ONTARIO COURT OF JUSTICE

DATE: 2018 11 13
TORONTO

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

MARK BROWN and TROY CAMPBELL

Before Justice K. Mulligan
Heard on November 5, 2018
Reasons for Judgment released on November 13, 2018

S. Lafrance ..... counsel for the Crown
S. Foda..... counsel for the accused Mark Brown
L. Liscio / Ms. Stanyon ..... counsel for the accused Troy Campbell

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MULLIGAN, J.:

[1] Mark Brown and Troy Campbell face numerous gun and drug charges. Both were arrested on September 27, 2017, during the execution of a Controlled Drugs and Substances Act (CDSA) search warrant. That warrant named Mr. Brown as the target and authorized the search of both his home and his car. Mr. Campbell was inside Mr. Brown's home at the time the police entered.

[2] The search of Mr. Brown's home resulted in the seizure of four guns, roughly 1.8 kg of cocaine, 100 grams of heroin, 16 grams of fentanyl, close to $100.000.00 cash and identification and mail in the name of Mr. Brown. All of those items were located in a closet near Mr. Brown's bedroom. Some of the items were seized from inside safes located within that closet. An additional firearm was located hidden in a couch in the living room, the same room in which Mr. Campbell was found. None of the items seized from Mr. Brown's residence were in plain view. Mr. Brown was arrested in his vehicle some distance away. The high risk take-down involving the "boxing" of his car was captured on video by the in-car camera installed in one or some of the police vehicles involved in the manoeuvre. When Mr. Brown was removed from his vehicle a search thereof netted additional illicit drugs.

[3] Both Applicants are before me seeking a stay of their combined 26 criminal and CDSA charges to address an alleged violation of their right to be tried without unreasonable delay. Their Ontario Court of Justice trial is set to begin with a pre-trial motion on November 28, 2018, and end on February 12, 2019. Seven days have been set aside to hear evidence with respect to the trial proper. The total period of delay, assuming their trial ends as scheduled, will be just over 16.5 months. As such, the delay in this case is just shy of the 18 month presumptive unreasonable delay ceiling set by the Supreme Court of Canada in *R v. Jordan* [2016] 1 SCR 631.

[4] Because the delay at issue is below the presumptive ceiling the Applicants bear the burden of establishing, on the balance of probabilities, that the delay is unreasonable. To do so each must show that they took meaningful steps to demonstrate a sustained effort to expedite the proceedings and that their case took markedly longer than it reasonably should have. I am mindful that the Supreme Court indicated that stays below the presumptive ceiling should only be granted in the clearest of cases.

Summary of Timelines

[5] The exact dates of the parties' correspondence, multiple court appearances and what occurred at each appearance are set out in detail in the Applicants' fulsome application materials filed in support of this motion. The Prosecution largely accepts the timelines set out therein. For the purposes of this decision, the dates set out below are distilled to the dates upon which some of the more relevant events occurred.

September 27, 2017	Both Brown and Campbell arrested
November 1, 2017 by private counsel	Brown released on bail after a contested hearing conducted
November 15, 2017	Brown and Campbell's 1st appearance in intake court-both Applicants assisted by private counsel though neither counsel was formally retained until later
December 6, 2018	Applicants' case assigned to a specific federal Prosecutor (*not the Prosecutor who argued this 11(b) motion)
January 3, 2018	Initial disclosure provided including notes of 4 of the 10 officers expected to be called at trial as part of the prosecution's case
January 22, 2018	Letter sent to federal Prosecutor's office detailing outstanding substantive items of disclosure
March 15, 2018	Information to Obtain (ITO) disclosed
March 16, 2018	Follow-up letter sent to federal Prosecutor's office seeking a response to the Applicants' letter of January 22, 2018

March 21, 2018	Letter sent to federal Prosecutor's office requesting additional items of disclosure (source documents) relating to the ITO
April (?), 2018	Crown pre-trial held by Mr. Campbell
April 26, 2018	Counsel for Mr. Brown schedules judicial pre-trial (JPT) for both Applicants
	Letter sent to federal Prosecutor advising that Applicants will be unable to conduct a meaningful JPT unless disclosure deficiencies are remedied
May 11, 2018	Notes of the officer who arrested Mr. Campbell disclosed
May 15, 2018	1st scheduled JPT cancelled due to insufficient disclosure Federal Prosecutor asked to consider a consent release for Mr. Campbell
	Applicants send letter to federal Prosecutor detailing all disclosure in their possession and all items still outstanding
May 18, 2018 conditions	Mr. Campbell released on consent on strict house arrest
June 18, 2018	2nd scheduled JPT cancelled due to unforeseen circumstance/insufficient disclosure
July 6, 2018	3rd scheduled JPT cancelled due to insufficient disclosure
	Email from federal Prosecutor to Applicants seeking clarification of what items of disclosure still outstanding
July 19, 2018	4th scheduled JPT. Discussions commence but are adjourned to allow all the provision of further disclosure.
	Scenes of crime officer's (SOCO) photos, booking videos and notes of 4 witness officers disclosed
July 24, 2018	5th scheduled JPT –JPT conducted in the absence of requested items of disclosure-trial estimates made
	Severance of Mr. Campbell's matters discussed
	Trial dates (7 days) and pre-trial motion dates (2 separate days set in advance of trial) scheduled and set
September 22 2018	In-car camera videos of Mr. Brown's vehicle stop and arrest disclosed

October 2, 2018	Applicants advised of case reassignment. Newly assigned federal Prosecutor advises items of outstanding disclosure will be forthcoming
October 3, 2018	Notes of Mr. Campbell's booking officer and the officer who seized cash related to Mr. Brown and took photos of same disclosed
	Brown's 11(b) Application filed
October 16, 2018	Final source document requested by Applicants disclosed
October 29, 2018	Brown's Garofoli and Stinchcombe application filed
October 22, 2018 filed	Federal Prosecutor's Response to Brown's 11(b) Application
October 25, 2018	Campbell's 11(b) materials (supplementary to Brown's) filed
October 31 2018	Federal Prosecutor's response to Campbell's supplementary 11(b) Application filed
November 5, 2018	11(b) motion hearing held
November 28, 2018	First day of Mr. Brown's scheduled pre-trial application (Garofoli) hearing
February 12, 2019	Last day of the 7 days currently scheduled to conduct Applicants' trial

Analysis

[6] Section 11(b) of the *Canadian Charter or Rights and Freedoms* guarantees to every person charged with an offence the right to be tried within a reasonable time. This right is based on Canada's expectation that its criminal justice system operate efficiently and expeditiously being as the stakes for both accused persons and the community at large are incredibly high. A timely trial is necessary to give support to the presumption of innocence that underpins our judicial system. It ensures that an accused person spends as little time as possible in pre-trial custody or on a release that places restrictions on his liberty. It helps to reduce the period during which a person alleged to be in conflict with their community's values and mores is subject to the stigma and shame of its allegations and the anxiety of its processes. A trial without unreasonable delay helps guarantee that evidence is preserved, moves victims and their families closer to closure and minimizes the emotional and economic bruise the process inevitably visits upon not only the individuals involved but the community as a whole. Not surprisingly, it is generally agreed that a criminal justice system that allows matters to unreasonably drag on risks being heaped with scorn and disrespect by the public it serves.

[7] As detailed in *Jordan,* the spirit informing the Charter's guarantee of the right to a trial without unreasonable delay has not always been reflected in our country's daily criminal court reality. Our system of criminal justice has demonstrated a growing tolerance of delay over time. Unfortunately many unreasonable trial delays have been countenanced by criminal courts throughout the country in the analysis of same. For the Supreme Court of Canada, Mr. Jordan's case appears to have been somewhat of a tipping point. Perhaps it is just part of its constant evolution in its application of core principles to meet changing circumstances as is all around of necessity.

[8] Speaking for the majority in *R v Jordan,* Mr. Justice Moldaver clearly signaled that a change of direction to the analytical framework governing the analysis of 11(b) motions was required moving forward. His Honour called out the "culture of complacency" that had slowly taken hold in our criminal courts with respect to trial delay and, in effect, instructed that "tolerated delay" or an over reliance on form as opposed to substance in process, be purposefully rooted out, examined and addressed, ideally proactively, at every turn. The goal, the Supreme Court was clear, is not perfection. The reality is that despite rigorous and mindful case management, even apparently straightforward trials can mushroom in terms of anticipated time requirements as a result of unforeseeable circumstances and the human condition of those whose participation make them possible. Perfection therefore, is an impossible not to mention, unrealistic standard to require of any party.

[9] As explained in *Jordan* the concepts of justice and efficiency are to be best viewed as co-dependents. Criminal justice system participants are, in effect, recast conceptually as trial enablers recognizing that though each stakeholder's role remains distinct all are expected work together to reduce delay in the lead up to and completion of criminal trials. To that end the Court in *Jordan* introduced a "presumptive ceiling" of delay beyond which a breach of s. 11(b) of the *Charter* was assumed: 18 months from the date of charge to the actual or presumed completion of trial in the provincial courts and 30 months in those courts helmed by a federally appointed Bench.

[10] Since it was recognized that no set number could magically give credence to the timelines of all, let alone any particular case, the assessment of any delay in question must also to focus on "compelling case specific factors". For that reason, the analytical framework in *Jordan* allows for the reality that even those accused persons whose trials are expected to be completed within or below the presumed ceiling might still suffer from unreasonable delays that violate s. 11(b) nonetheless.

[11] When Mr. Justice Moldaver stated in *Jordan that* "there is little reason to be satisfied with a presumptive ceiling of 18 and 30 months" he made it clear that the country was being tasked with stopping the delays before they figuratively burst through the ceiling. That a Judicial Stay exists to remedy the ruptured ceiling is of little comfort if the source of the rupture could have been avoided by remaining alert and proactive to the domino effects of known potential hazards. The ultimate end goal therefore, is not to have Courts redress delay that has already occurred but to motivate all participants to consistently work to reduce the time requirements of every trial's progress from beginning to finish.

[12] Again to be clear, I am mindful that in cases such as the one before me, where the anticipated delay is under the presumptive ceiling, an accused may "in clear cases" still demonstrate that his or her right to be tried within a reasonable time has been breached. The onus rests on the Applicants to establish, on the balance of probabilities, that they took meaningful steps that demonstrate a sustained effort to expedite the proceedings and that the case took markedly longer than it reasonably should have.

Net Delay

[13] The application of the *Jordan* framework to Mr. Brown and Mr. Campbell's case begins with an assessment of the total delay from charge to the anticipated end of trial. As it currently stands their trial is anticipated to end on February 12, 2019. The total delay therefore is just over 16.5 months. The 7 day trial and 2 day pre-trial motion date were scheduled after the fifth scheduled judicial pre-trial (JPT) at which a number of substantive items of disclosure were still outstanding. The police in- car video recording which apparently captured the entire "takedown/arrest" of Mr. Brown had yet to be disclosed. The source documents for the ITO remained outstanding as were some officers' notes. While I am mindful that not every single piece of disclosure need be provided before elections can be made and hearing times properly estimated the application record makes clear that some of the missing disclosure would not be properly classified as being peripheral to the anticipated issues at trial.

[14] The use of judicial pre-trials has been touted as a useful tool in case management. See for example:

R. v. Tran, [2012] O.J. No. 83 ONCA where in paragraph 34 the Court held:

> "...it seems to me that requiring a judicial pre-trial to set trial dates is a reasonable and necessary case management tool in busy judicial centres designed to ensure overall timeliness of the system and thus protect the Charter rights of accused generally in the presentation of their cases ";

and see also *R. v. Ignagni*, [2013] O.J. No. 3531 ONSC where in paragraph 45 the Court stated:

> "As indicated in *R v. Mahmood*, [2012] O.J. No. 5208 pre-trial conferences serve many useful purposes. They require the parties to wrestle with real issues in the case before setting the matter down for trial. Admissions can be made. Issues can be narrowed and focused. Pre-trial motions can be discussed and efficiently planned. Potential problems can be addressed, if not resolved. Practical issues regarding the trial can be anticipated. Such conferences not only permit the parties to better prepare themselves for trial, they inevitably reduce the court time necessary to try the matter, and ensure that the trial proceedings move as efficiently as justice permits. It is hardly surprising, therefore, that busy judicial centres require, as a matter of court policy, that before valuable court time and resources are scheduled and committed for the trial of particular kinds of cases, such pre-trial conferences must be held."

[15] However, in order for a judicial pre-trial to reach its potential the parties need to be prepared. This requires at very least that they be in possession of enough substantive

disclosure to enable each to make the decisions described above and to engage in the procedures codified in Rule 4.2 (1-3) of the Criminal Rules of the Ontario Court of Justice published in 2015.

[16] In the Applicants' case I note that the JPT form of July 24, 2018, does not address how it is that the Prosecution intends to try to prove the nature of the substances and the alleged firearms in question. It also does not address how it is that the Prosecution plans to prove that Mr. Brown was bound by an Order made pursuant to s. 109 of the *Criminal Code*. I see no concession noted with respect to any of these areas of evidence in the space on the preprinted JPT form dedicated to the listing of concessions made by the parties. Experience would suggest that these areas might be addressed most efficiently by filing, on consent, analyst/expert reports, certified copies of prior judicial Orders or a concession or agreed statement of fact assuming that there are no issues with respect to the proof of these necessary averments. I do note from the JPT form that 1 expert is expected to testify and that her report will be tendered "in advance of trial". That means however, that the parties have not been able to assess whether further witnesses will be required or concessions can be made based on that report and there is no indication which areas or subject(s) the missing anticipated expert's report will cover. While it is definitely not unusual for expert reports to be provided after a JPT is held and a trial date set, in this case it appears that may be one a few areas that have a real potential to add to the evidence needed by the Prosecution to prove its allegations and thus their witness list has a real potential to grow in length

[17] To be clear I do not say this as a critique of the JPT judge nor of the parties. I recognize that all parties did the best they could with the materials they possessed at the time of the last JPT. I also recognize that the Prosecution and the Defence both acknowledge as part of the Ontario Court of Justice JPT form that the Court expects that should anything change with respect to the trial roadmap contained therein, they will notify each other and the Court as soon as possible. I only point these issues out as it is also my experience that trial estimates, made absent material information, even in instances where everyone is doing their best to identify potential issues and properly estimate the time required to address same, often veer wildly off track. For example, from the Garofoli materials filed to date by Mr. Brown, keeping in mind the last requested ITO source document was only provided by way of disclosure less than a month ago, I would not be surprised if the 2 days presently estimated for that motion prove to be overly optimistic. Mr. Brown's Garofoli Application filed October 29, 2018, addresses "Step 2" concerns. Given the problems with disclosure to date, filing deadlines have already been waived by the parties and this Court to ensure the Garofoli Application , at least, commences as scheduled so no Prosecution response has been provided as of yet. In such circumstances it is not too speculative to assume that the Prosecution may be seeking to rely on Garofoli's "Step 6" process which is likely to increase the motion's life expectancy.

[18] I point out the issues with the judicial pre-trial only to note that it is by no means certain that the trial will complete on the date estimated. In these circumstances, the more than 16.5 months of delay presently in issue may fairly be viewed as a conservative or "soft" trial completion date estimate.

Defence Delay

[19] A review of the application record materials satisfies me that none of the delay to date is attributable to the Defence. The Prosecution's argument that the failure of Mr. Brown to engage in a Crown pre-trial amounts to 21 days of Defence delay is a red herring given the timeline of disclosure in this case. This is illustrated by the fact that despite the Crown pre-trial held by Mr. Campbell, four judicial pre-trials scheduled thereafter were adjourned due to insufficient disclosure. Though I am mindful that the second scheduled JPT was cancelled, in part, due to a solemn unforeseeable circumstance the fact is that disclosure remained in the same state it was at the time the first scheduled JPT was cancelled due to lack of disclosure. In fact, it appears that if Mr. Brown had waited to conduct a meaningful Crown pre-trial before scheduling a judicial pre-trial as is normally done, the matter would have been delayed even further. As *Jordan* reminds us, substance matters not form.

[20] Likewise, the fact that Defence waited 17 days to first advise that the video disclosure the assigned Prosecutor apparently erroneously advised them was ready for pick up on May 17, 2018, was, in fact, not available also in no way contributed to any delay. As of July 3, 2018, the video disclosure was still not available to be disclosed to the Applicants despite their subsequent written and oral requests for same. Thus, it appears this was not a case of the video disclosure actually being available for pick up by the Applicants but simply not locatable due to the Prosecution Service's front counter staff being temporarily unable to put their hands on it. Things do happen in a busy office. Had that been the case, the Prosecution's assertion that the Applicants' failure to act with dispatch to advise it of its stumble, as ironic as that sounds, may have had some merit. To the contrary however, this is an illustration one of the many unexplained "fails" encountered along the Applicants' path to trial.

Defence Initiative-Meaningful and Sustained Steps

[21] When determining whether the Applicants have demonstrated that they took meaningful, sustained steps to expedite the proceedings I am mindful that the Court is tasked with examining what they could have done and what they actually did to get the case heard as quickly as possible. In this case, the one equates to the other. In other words, what could have been done by the Applicants, what should have been done by the Applicants, is exactly what was done by the Applicants.

[22] The Applicants each had counsel on board at their show cause hearings. The fact that counsel were not formally retained until a few appearances later did not cause any delay whatsoever. In fact, it speaks to the Applicants' intention to swiftly address necessary steps in the intake processes.

[23] At every intake court appearance the Applicants, through counsel, were vocal and specific about their need for disclosure generally and in particular. Transcripts provided for each set date appearance show that Defence were clear in their request for disclosure and reiterated their request at each appearance. Mr. Campbell, in particular, made it

known that the lack of disclosure was impeding his bail hearing from being conducted. Perhaps Mr. Campbell approached his bail strategy differently than did Mr. Brown because he has a criminal history that differs significantly from Mr. Brown's. Maybe Mr. Campbell did not enjoy the support of a strong potential surety. It appears from the transcripts filed that he may have already been out on a prior interim release at the time he was charged with the offences alleged before me. Whatever his particular circumstance, it matters not. It appears that the strongest ground of release for Mr. Campbell was the strength, or lack thereof, of the Prosecution's case against him. To that end, Mr. Campbell's counsel made it clear that she needed to review disclosure in order to assess his prospects for bail. For eight months after Mr. Campbell's arrest neither she, nor the Crown presumably for that matter, was able to do so.

[24] The record before me informs that Mr. Campbell was found in a residence associated to the warrant's target, Mr. Brown. No contraband was located in plain view and the Prosecution's case appears to rest largely on an utterance allegedly made by Mr. Campbell to the officer who arrested him. That utterance, recorded in the notes of PC Jugpaal disclosed May 11, 2018, is reproduced below:

> "I begin to read RTC and caution from RP of M/B-as I say the words firearms (plural indic more than 1); Campbell cuts me off and says 'two firearms? I only know about one." I stop ml and tell him to let me finish the RTC and caution. (Q) DYWTCAL? (A) Yes (Q) DYWTSA? (A) Come on bro I know he has one but I don't live here."

[25] Assuming for the sake of argument only, that the utterance is found to be admissible, final submissions as to whether that utterance combined with Mr. Campbell's presence and location within the home, is sufficient to establish beyond a reasonable doubt his knowledge, consent and control of the contraband alleged to have been located in Mr. Brown's home and/or vehicle, will surely be robust. The fact that eight months after his arrest the Prosecutor consented to Mr. Campbell's release within days of receiving the arresting officer's notes speaks volumes in my opinion. Of course other factors could have been at play in the Prosecutor's decision to consent but none were brought to the Court's attention.

[26] The Applicants wrote numerous letters to the Prosecutor's office outlining what disclosure they were seeking and why. Almost every piece of written correspondence and every request made in court, on record, clearly identified the missing items of disclosure as negatively impacting the Applicants' ability not only to conduct a meaningful pre-trial, be it Crown or judicial, but their ability to decide their mode of election as well. Approximately 11 letters and emails were sent. None of those letters were pro forma disclosure requests. Each specifically stated what was missing to the best of the Applicants' knowledge.

[27] At each of the more than 12 court appearances the Applicants informed the Courts of their dilemma. The nature of the concerns over the delays complained of as expressed by the Courts varied. Unfortunately, the Judicial Endorsement Forms (JEFs), developed by the Ontario Court of Justice to assist in case management, were not endorsed with the type or quality of information that might have assisted each justice to quickly understand the full extent of the parties' issues in the brief appearances each made before them at

each set date. Since JEFs are a means of easily accessible, intra-judicial communication, designed to enable each successive Court to quickly be apprised of issues relevant to a particular case and to follow up on concerns raised and directions given by their colleagues at previous court appearances, it's unfortunate this case management tool appears not to have been optimized by the Bench. There is a case to be made that the introduction and use of JEFs by the Ontario Court of Justice represents an example of the proactive, preventative, problem solving behaviour envisioned in *Jordan*. To make that case however, the forms need to be utilized.

[28] A review of the transcripts filed as part of this application reveals that at some points in the process the Prosecution Service's left hand didn't seem to know what its right hand was doing. On January 23, 2018, and March 14, 2018, representations were made to the Court by the Prosecutor calling the federal list that the disclosure issues raised by the Applicants would be brought up with the Prosecutor assigned to their case. Yet on March 20, 2018, the assigned Prosecutor telephoned counsel for Mr. Brown asking him for another copy of his disclosure request letter of January 22, 2018.

[29] On April 26, 2018, the Applicants, via Mr. Brown's counsel, wrote another detailed letter requesting disclosure due to the fact that, other than being provided with a copy of the search warrant and a "heavily redacted ITO", the Applicants had still not received a response to their letters of January 22, 2018, and March 21, 2018. Yet, on the first scheduled JPT on May 15, 2018, which was unable to proceed due to a lack of disclosure, the assigned Prosecutor was of the mistaken opinion that further substantive disclosure had been made.

[30] The same day the first JPT was cancelled the Applicants wrote yet again to the assigned Prosecutor detailing not only what items were still missing but what items of disclosure they actually had in their possession. From an examination of that letter and the items of disclosure missing as of that date, it is clear why the first JPT could not proceed. Many of the missing items would have clearly impacted on all parties' ability to engage in substantive pre-trial discussions. Two more JPTs would be cancelled before the JPT judge was able to commence case management discussions on July 19, 2018. That JPT was adjourned to continue on July 24 2018, in the hope that full disclosure would be made in the interim. It wasn't and, as noted, the Applicants proceeded in any event so that a trial date could be set thereafter.

[31] Given the disclosure history described, it is surprising that on a number of occasions the Applicants' complaints about the pace of disclosure were met with responses from Prosecutors calling the daily federal lists that it was their position that disclosure had been made and that Crown pre-trials should be set. In the February 6, 2018, transcript the Prosecutor advised the Court that "there is no reason why a Crown pre-trial cannot be scheduled and held." On April 5, 2018, the Prosecutor calling the Federal list indicated to the Court,

> "with respect to this matter I can advise that it is quite dated. It dates from September 27, 2017. The Crown provided initial disclosure some time ago, disclosed the ITO for the search warrant on March 15, 2018. I understand the the assigned Crown's position for some time on this matter has been that a Crown pre-trial should be booked and held to move this matter forward....There is no reason a Crown pre-trial cannot be held at that time

> even with the disclosure that's outstanding. The disclosure that has been made is significant enough that a Crown pre-trial ought to be held."

[32] These statements are all form and no substance given that three JPTs would be cancelled thereafter for lack of substantive disclosure given the notes of numerous trial witness officers including the notes of PC Jugpaal, Mr. Campbell's arresting officer, the source documents for the ITO and the in-car camera videos which captured Mr. Brown's takedown and arrest had yet to be disclosed. Again, I am mindful that not every last item of disclosure need be disclosed before a trial date can be set. That being said enough substantive disclosure must be made to allow an accused person to make an election as to mode of trial, estimate trial issues and Charter motions and give meaningful trial time estimates. In fact, the effective scheduling of the justice system's finite resources depends on informed trial time estimates by all parties.

[33] Applicants kept writing letters and emails, informing the Courts of their issues and setting JPT after JPT hoping to get enough disclosure to make informed estimates as to trial time required. In late June- July 2018, Mr. Campbell approached the Prosecutor with a statutory declaration, presumably disavowing any knowledge of drugs, in the hope that the Prosecutor would withdraw the CDSA charges and proceed on the gun charges only. Given the evidence against him, it is conceivable that such a trial may have been able to proceed based on an agreed statement of facts, the only issue being the admissibility of Mr. Campbell's utterance and, if found admissible, submissions thereafter as to the sufficiency of the evidence to support a conviction against him. Evidence of this possibility is found in a notation on the JPT form dated July 19, 2018. For reasons unknown, the Prosecutor was not interested in so proceeding. While I recognize that the decision to severe jointly accused parties is solely in the discretion of the Crown and that the Court plays no supervisory role for such decisions, I point this out solely as an illustration of the extent to which the Applicants, jointly and severally, clearly demonstrated a sustained effort to expedite the proceedings.

Reasonable Time requirements of the Case

[34] The Court in *Jordan* made it clear that procedural requirements necessary for the setting and completion of trails were already accounted for in their "ceilings". As such it took into account the increased complexity of pre-trial and trial processes since its decision in *R v Morin* ([1992] 1 SCR 771).

As Mr. Justice Moldaver remarked at paragraph #42 of *Jordan*:

> New offences, procedures, obligations on the Crown and police, and legal tests have emerged. Many of them put a premium on fairness, reasonableness and a fact-specific analysis. They take time. They also take up judges, courtrooms and other resources.

[35] In the case before me the Prosecution did not claim that there were any exceptional circumstances that should impact on the Court's assessment of the delay. It did not provide any evidence or agreed statement to justify much less explain why disclosure, the overwhelming majority of which was likely in existence as of the time Mr. Brown and Mr. Campbell were arrested, took 1 year to complete. I say that as in-car camera video

footage and requested source documents to the ITO were not disclosed until late September 2018.

[36] Though I am well aware that the ITO would have needed to have been redacted and that, given the various people required for this to happen to ensure sensitive and identifying information remains confidential, completing this task can be difficult, there was no evidence why it took 6 months for the redacted ITO to have been disclosed. I do realize that the Crown likely had to obtain an unsealing Order but these types of Orders are generally done on consent in chambers and can be obtained within days of their submission to a Judge. There is no explanation as to why it took 8 months to disclose the notes of 4 of the officers who are expected to testify at trial for the prosecution and 10 months to disclose 3 other testifying officer's notes. I have no reason not to assume from experience that all the missing officer notes were complete as of the date of the Applicants' arrests.

[37] With respect to the in-car camera disclosure, I keep in mind that this is not simply a booking video which, in the circumstances at hand, is likely to be of little relevance to any trial issue. I am mindful that there is a voluntariness issue and 10(b) violation alleged but these relate to the utterance Mr. Campbell allegedly made in Mr. Brown's living room at the time of arrest and not en route to or while at the police station. The importance of Mr. Campbell's arresting officer's notes has already been discussed. The in-car camera video in question apparently captures images of the high risk takedown of Mr. Brown namely the boxing in of his car, his arrest and the search of his vehicle thereafter. It was recorded on September 27, 2018. There was no evidence that this video needed to be edited in any way and so in order to be disclosed it needed only to be burned. Of course that would take some time. Why it took 1 year to do so I have been provided no clue.

[38] The Prosecution Service argued that this case is complex. It pointed to the fact that 7 days has been set aside for trial evidence. It quoted *R v Herrera-Melendez* [2010] ONCJ 560, where at paragraph 29 the Court found as follows:

> Given that the Crown has advised that there are a number of witnesses, civilian and police, involved as well as a search warrant I do not feel it can be characterized as a simple case.

[39] I note that *Herrera-Melendez* was a case decided before *R v. Jordan*. The paragraph cited dealt with Her Honour's finding as to why she determined that 65 days was a reasonable period of time for the Crown in that case to provide initial disclosure. That type of calculation is no longer needed after *Jordan* assuming no exceptional circumstances are claimed by any party. Judges are now to "step back from the minutiae and adopt a bird's eye view of the case." To further quote from *Jordan* at para. 90:

> Where the Crown has done its part to ensure the matter proceeds expeditiously-including genuinely responding to defence efforts, seeking opportunities to streamline the issues and evidence, and adapting to evolving circumstances as the case progresses-it is unlikely that the reasonable time requirements of the case will have been markedly exceeded.

[40] Unfortunately, that is not how I would describe the Prosecution Services initial dealings in regard to the case at hand. I have looked very hard but cannot find the "diligent proactive Crown" that the Court in *Jordan* counseled justices to look for as a strong indicator that a case hasn't taken markedly longer than reasonably necessary.

[41] It is interesting to note that Mr. Jordan's case involved 10 co-accused, 14 criminal charges, 9 days of preliminary hearing and 6 weeks of trial time to deal with the "mountain of evidence" involved in that case. None the less, Mr. Justice Moldaver described Mr. *Jordan*'s case as one of "moderate complexity".

[42] Mr. Campbell has asserted in his Application record that the trial issues engaged in his trial focus largely on the proof of "possession" as it is defined for criminal law purposes. For Mr. Brown, his materials disclose that the main trial issue for him is a s.8 *Charter* issue. The Applicants' case involves 1 warrant, 1 affiant and 1 sub affiant. All police observations were made on the date the warrant was executed and the Applicants arrested. There are no civilian witnesses involved but for perhaps an expert, no wire taps, no production orders, no alleged conspiracy, and no novel issues of law expected to be argued. The case before me did not start out with tens of co-accused who were eventually whittled down to a few, involve a lengthy investigation spanning months or even days nor does it involve numerous or complicated legal issues. In short, Mr. Brown and Mr. Campbell's case has none of the hallmarks of complexity identified in cases such as *R v Schertzer*, [2009] ONCA 74 and *R v Nguyen* [2013] ONCA 168.

[43] As can be seen from the record, a 7 day out of custody trial date was able to be accommodated just slightly over 6 months from the date of the final JPT. I pause here to note that in fact, it appears from the transcript of July 24, 2018, that earlier dates for a seven day trial commencing November 30 2018 or January 23, 2019 were available to the Court and, for the most part, all parties but not scheduled by the trial coordinator because of "a rule in that office that there can't be a gap of so many days." (Transcript of July 24, 2018 p.7 lines 14-18) As I understand it, both the Prosecutor and the Applicants were told that their estimated 7 days of trial must be set "as consecutively as possible". Since the Prosecutor was unavailable on one of the dates in one set of earlier trial dates offered and the Applicants were unavailable for 2 days in the second set, the trial coordinator moved on to the next seven day chunk of consecutive dates that being February 4-8, and February 11-12, 2019, i.e.: the dates currently scheduled for this trial.

[44] I have been sitting at Old City Hall for over 3 years now. I would consider myself fairly well versed on the local practice. I am not aware of any such rule. I do recognize that, for many reasons, it is preferable for a multi-day trial to proceed on consecutive days and as such, in setting a seven day trial like this one, it is ideal if the days are all consecutive. However, I would describe that as a best practice as opposed to a rule. The Old City Hall trial coordinators' office has been in a state of flux for a long while and has only recently had the benefit of working with a full complement of "permanent" staff. There have been a number of procedural changes as of late and it is understandable that some of the rules, best practices, newly implemented procedures and forms are still being worked through. I note that gaining access to current local procedures might not always be an easy task. For instance, the Ontario Court of Justice Practice Direction made in 2013 regarding 11(b) motions and currently listed on the OCJ's web site still refers to *R v*

Morin and a list of related case law that is arguably of diminished value in light of *R v Jordan*. I am not aware of any single source location where a member of the public can go to inform themselves of or verify the current rules, practices and guidelines applicable to Old City Hall.

[45] The Ontario Court of Justice is doing a good job of trying to keep pace and modernize given its limited resources and its ability to innovate within the terms of its Memorandum of Understanding with the Ministry of the Attorney General and the province's overall system of the administration of justice. Though I am not criticizing the Ontario Court of Justice or anyone in particular I am trying to point out that if this seemingly erroneous "rule" was applied to govern the Prosecutor and the Applicants as they were trying to set trial dates then it negatively affected them both equally. Since the Justice presiding in court on July 24, 2018, did not question or correct the parties' understanding of the supposed "rule" when it was explained by them I cannot fault either side for accepting what they had been told. In fact I can understand, given the source of the information, why no one questioned its accuracy. Why whould they? But perhaps, given the fact that the Applicants were clear that the delay to that point presented a serious issue, the Prosecutor and/or the Court should have. It is after all ultimately the legal system's obligation to bring an accused to trial. It would appear, based on this record, that there is still some distance to go in achieving the proactive problem solving culture described in Jordan. This is not to say that the Ontario Court of Justice and its Modernization Committee have not gone a long way towards ensuring the seed sown by Jordan has whatever nourishment it has the ability to provide to ensure its growth.

[46] It is not my understanding that Old City Hall is regarded as a court house plagued by significant delays in its recent history. It is currently providing out of custody multiple day trial dates within 4-6 months of the date of trial request. In fact, Mr. Brown and Mr. Campbell were initially offered trial dates of November 14-22, 2018 but could not avail themselves of those earlier dates given the problems with disclosure. As indicated in the transcript of July 24, 2018, though Mr. Brown's counsel was unavailable for that time frame it was of little consequence in terms of delay as there was no way that the Garofoli filing deadlines could be met given the state of disclosure at that time. As corroboration of Mr. Brown's counsel's position in this regard and as indicated to the Court that day, I point to the fact that the last requested ITO source documents which formed part of the Prosecutor's disclosure obligations and which may likely be relevant to the Garofoli application were not disclosed until just last month. In addition, "McNeil disclosure" relating certain antecedents of the affiant to the search warrant/ITO in issue was also not made until October 2018. Filing deadlines for the Nov 28, 2018, motion have had to be compressed as it is even with the trial proper expected to commence in February 2019. There is little possibility therefore, based on the record before me, that an earlier motion date would have realistically gone ahead even if counsel had been available for the earlier trial date identified. What would have happened, it seems quite probable from the application materials, is that the earlier motion/trial dates would have had to have been adjourned and those days vacated.

[47] Because it appears that disclosure could have been made within 90-120 days of the Applicant's arrest, a time frame that, from my experience is reasonable in the circumstances of this case, the actions of those outside of the Applicants' control resulted

in at least 6 months of added delay in their ability to have a crown pre-trial, conduct a judicial pre-trial and complete their trial thereafter in the Ontario Court of Justice. This is surely a marked delay in these case specific circumstances and one which, on the fact of this case, I am satisfied on the balance of probabilities is clearly unreasonable. The violation of the Applicants' 11(b) Charter rights requires a Judicial Stay of all charges before me in remedy thereof.

Released: November 13, 2018

Signed: Justice K. Mulligan